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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD RAY BLANTON
CLYDE EDWARD HOOD, JR.
and JAMES M. ALLEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IN A FEDERAL CRIMINAL TRIAL INVOLVING MASSIVE PREJUDICIAL PUBLICITY DOES THE TRIAL JUDGE ADEQUATELY PROTECT THE DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WHEN HE REFUSES TO ASK ANY OF THE PROSPECTIVE JURORS WHETHER THEY HAD PREVIOUSLY FORMED AN OPINION ABOUT THE GUILT OR INNOCENCE OF THE DEFENDANT, THE NATURE AND EXTENT OF ANY SUCH OPINION IF HELD, OR THE SOURCE AND INTENSITY OF EXPOSURE TO THE PREJUDICIAL PUBLICITY, AND INSTEAD MERELY ASKS THE JURORS, EN MASSE, WHETHER THEY FEEL THEY COULD SET ASIDE ANY SUCH OPINION.

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INTEREST OF THE AMICI

This brief is in support of the petition for Writ of Certiorari sought by the defendants in this case and is filed on behalf of the Tennessee Association of Criminal Defense Lawyers and joined in by the Alabama Association of Criminal Defense Lawyers. Pursuant to Rule 26.1 of this Court's Rules, letters of consent have been obtained from the parties and are filed with this brief.

The Tennessee Association of Criminal Defense Lawyers is a non-profit corporation organized under the laws of the State of Tennessee, whose members are licensed attorneys engaged in the defense of criminal cases. According to the by-laws the purposes of the corporation are, *inter alia,* to protect those individual rights guaranteed by the United States and Tennessee Constitutions, and to promote justice and the common good through cooperation, education and assistance. The Alabama Association of Criminal Defense Lawyers is a group of attorneys organized for similar purposes.

The interest of the amici in this case stems from the "unprecedented"[1] curtailment of voir dire in a case involving the quantity and quality of prejudicial publicity presented here. The amici fear that this case may in the future stand as authority for virtually any type of limitation whatsoever on voir dire, including perhaps ultimately authorizing a voir dire consisting of only one question. The decision in this case effectively eliminates the concept of voir dire as a valuable tool in obtaining a fair and impartial jury and in overcoming the effects of negative pretrial publicity.

The amici feel that this case has potential to impact significantly on the administration of criminal justice inasmuch as the decision of the Sixth Circuit sanctions the curtailment of procedures designed to insure the right to trial before a fair and impartial jury in a case where cautionary measures were most needed to insure protection of that right.

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[1] Quoting from J. Engel's dissent for en banc minority in the Sixth Circuit.

ARGUMENT

A. INTRODUCTION

This case presents issues concerning whether adequate procedures were taken by the trial judge to assure the selection of a fair and impartial jury in the trial of the Ex-Governor of the State of Tennessee, Ray Blanton, and two of his aides for violation of federal mail fraud, extortion, and conspiracy statutes. The nature and extent of the massive prejudicial publicity in this case has been adequately characterized in the opinion of the Sixth Circuit Court of Appeals as well as in the individual defendant's petitions for Writ of Certiorari to this Court. For introductory purposes relating to this brief it is enough to simply state that the publicity in the State of Tennessee was indeed massive and highly inflammatory, involving prejudicial allegations not only pertaining to the defendants' involvement in this case, but also allegations of involvement in other collateral matters such as the alleged participation of the Governor in the sale of pardons and paroles to state inmates.

Prior to trial, counsel for the defendants made timely written and oral motions in the trial court for individual voir dire of the jurors as to their exposure to the massive pretrial publicity.[2] The trial judge not only denied this request, but went even further, and refused to ask questions proposed by the defendants which were designed to identify those jurors that had already formed an opinion as to the defendant's guilt or innocence, determine the nature and extent of any such opinion and, determine the extent to which the individual jurors had been exposed to such publicity. Instead, the trial judge only made a generalized in-

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[2] Indeed, the record in this case substantiates the statement in defendants' Hood and Allen's petition that the pretrial publicity "was massive and adverse to a degree probably unprecedented in Tennessee judicial history." Petition for Writ of Certiorari on Behalf of Hood and Allen, page 2.

quiry of the jurors, en masse, as to whether or not they could set aside any such previously formed opinion and make a decision solely on the evidence presented in the courtroom.

The trial judge, in effect, decided to allow the jurors to subjectively make their own determination as to their impartiality, irregardless of either the nature and extent of their exposure to the publicity or as to the nature and extent of any opinion which the juror may have already formed. In so doing, the trial judge abdicated his responsibility of assuring a fair and impartial jury, inhibited the development of any meaningful information by which defense counsel could discharge their duty in this regard, and effectively precluded any appellate court from making its own objective, informed determination of the jury's impartiality. This case does present issues which have split other courts and which do not appear to have been previously decided by this Court, see parts B and C, infra. However, the refusal of the trial judge to meaningfully participate in or allow defense counsel to meaningfully participate in the determination of the jurors' impartiality has not been previously sanctioned by any federal court in a case involving the kind of prejudicial publicity presented here. The refusal of the trial judge to even ask the jurors whether they had previously formed or expressed an opinion concerning the case and to attempt to determine the nature and extent of any such opinion violated the defendants' Sixth Amendment rights to a fair and impartial jury and the effective assistance of counsel, impaired their right to the intelligent exercise of peremptory challenges, and was historically inconsistent with the administration of justice in the federal system.

B. THE DECISION OF THE SIXTH CIRCUIT COURT IN THIS CASE CONFLICTS WITH PRIOR APPLICABLE DECISIONS OF THIS COURT.

1. Prior decisions of this Court indicate that the trial judge was required at a minimum to identify those prospective jurors who had previously formed opinions concerning the defendants' guilt or innocence and inquire into the nature and strength of any such opinion in order to adequately assure the defendants' Sixth Amendment right to a fair and impartial jury.

The Sixth Amendment right to a fair and impartial jury presupposes at a minimum that the jurors have not previously formed an opinion concerning the defendant's guilt or innocence which will interfere with their ability to fairly try the case on the evidence presented in court. While, in rare cases, this Court has indicated that a presumption of partiality may even arise without resort to an examination of the voir dire, see *Rideau* v. *Louisiana*, 373 U.S. 723, 10 L.Ed.2d 663 (1963), the general rule seems to be that the voir dire is the procedure used to evaluate whether or not a juror is truly impartial. *Irvin* v. *Dowd*, 366 U.S. 717, 6 L.Ed.2d 751 (1961). Indeed, a "searching" voir dire of prospective jurors concerning the effects of pretrial publicity is one of the methods which is to be utilized to insure the delicate balance between the often competing interests of freedom of the press and a defendant's right to a fair trial. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 564-5, 49 L.Ed.2d 683 (1976). While a juror who has previously formed an opinion may not necessarily be disqualified, if he can set such opinion aside, *Irvin* v. *Dowd*, *supra*, the juror's bare assertion of such impartiality is not dispositive, and a defendant has a right to attempt to demonstrate the juror's actual, though perhaps undisclosed, bias. See *Murphy* v. *Florida*, 421 U.S. 794, 44 L.Ed.2d 589 (1975), *Irvin* v. *Dowd*, *supra*, *Marshall* v. *United States*, 360 U.S. 310, 3 L.Ed.2d 1250 (1959). Where the threshold voir dire inquiry indicates the existence of a preex-

isting opinion on the part of the juror, the next step is to inquire into the nature and strength of that opinion to determnine its impact on the juror's impartiality, and whether the juror's assurance of such impartiality can reasonably be relied upon. *Irvin* v. *Dowd.*

The decision of the trial judge in this case to ask the jurors only whether they could set aside any preexisting opinions concerning the defendants' guilt or innocence and further to simply accept, without further inquiry, their positive responses thereto, is in direct conflict with this Court's teachings in *Irvin* and *Murphy*. The refusal to even make a rudimentary inquiry into the nature and strength of any previously held opinions precluded the trial judge from effectively exercising his responsibility of making an informed decision as to the actual impartiality of the jurors, and equally importantly, foreclosed meaningful appellate review of the jurors' impartiality. See *Irvin* v. *Dowd, supra,* 366 U.S. at 723, ("duty of the Court of Appeals to independently evaluate the voir dire testimony of the impanelled jurors").

Comparison of this case with *Irvin* illustrates the dangers associated with the procedure used here. Eight of the twelve jurors selected in the *Irvin* case stated on the voir dire examination that they held an opinion that the defendant was guilty, even though they stated they could set such opinion aside, and ninety percent of the total prospective jurors examined stated that they had an opinion concerning the defendant's guilt, ranging from intense to mere suspicion. Under these circumstances, despite the jurors assurances of impartiality, this court held that there was a presumption of partiality and indicated that the defendant's trial should have been transferred to another community. Had the trial judge in *Irvin* followed the procedure here, and not asked any questions to determine whether the prospective jurors held an opinion concerning the defendant's guilt or innocence, or the nature and extent of such opinion, there would have been no voir dire information for this court to evaluate and the trial judge's action would have been simply

non-reviewable, as here. The opinion of the Sixth Circuit misses this crucial point when, in attempting to distinguish *Irvin*, it states: "In our present case *no* juror who helped determine the case expressed a pretrial conviction of appellants' guilt." (Petition for Writ of Certiorari of Hood and Allen, Appendix, p. 29) (emphasis in original). This reason is obvious. *They weren't asked* if they had already formed an opinion concerning the defendants' guilt or innocence. In fact, as J. Engel notes in his dissent, the jurors were admonished not to volunteer any information and only respond directly to the questions asked. (Petition for Writ of Certiorari of Hood and Allen, Appendix p. 37). Perhaps all twelve jurors selected had an opinion that the defendants were guilty and perhaps all of these opinions were intensely held. There is simply no way to tell as the trial judge refused to make any such inquiry.

Likewise, in *Murphy*, the trial judge did identify those jurors with previously formed opinions and determined the nature and strength of those opinions.

This Court's decisions in *Irvin* and *Murphy* when read together hold that while jurors with preconceived opinions concerning a defendant's guilt or innocence are not automatically disqualified if they state they can set such opinion aside, their assertions of impartiality are not necessarily dispositive where inquiry into the nature and strength of that opinion fails to give reasonable, objective assurances of that impartiality. The decision of the trial judge in this case for foreclosure any such inquiry conflicts with the procedures established by this Court to provide such reasonable assurances of impartiality.

2. Prior decisions of this Court indicate that the procedure followed by the trial judge improperly infringed upon the defendants' right to exercise peremptory challenges as guaranteed by the *Federal Rules of Criminal Procedure*.

The original panel of the Sixth Circuit which reversed this conviction held that the procedure followed by the trial judge

not only was inadequate to assure the defendants' right to a fair and impartial jury under the Sixth Amendment, but also inadequate to secure the defendants' right to intelligently exercise peremptory challenges, *F.R.Crim.P.* 23. See *Blanton* v. *United States,* 700 F.2d 298 (1983).

This Court has recognized that voir dire operates "as a predicate for the exercise of peremptory challenges" and that the concept of the peremptory challenge is such an ingrained part of our judicial system that "the denial or impairment of the right is reversible error without a showing of prejudice." *Swain* v. *Alabama,* 380 U.S. 202, 219, 13 L.Ed.2d 759 (1965). While not constitutionally required, the peremptory challenge is intimately tied to the Sixth Amendment guarantee of a fair and impartial jury in that the challenge serves "to eliminate extremes of partiality on both sides." *Swain* v. *Alabama, supra,* 380 U.S. at 219. Voir dire serves as the mechanism for eliciting sufficient information to enable counsel to intelligently determine when to exercise a peremptory challenge a strike a juror whom counsel may feel is not impartial, even though the existence of such partiality may not be demonstrable to the degree necessary to justify challenge for cause.

A procedure whereby the trial judge refuses to even identify those jurors who have previously formed an opinion or permit any inquiry into the nature and strength of such opinion effectively abrogates any meaningful exercise of "one of the most important of the rights secured to any accused", *Pointer* v. *United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208, and thus constitutes, if not a total denial, then at least a severe impairment of the right of peremptory challenge contrary to previous decisions of this Court.

3. Prior decisions of this Court indicate that the procedure followed by the trial judge deprived the defendants of their Sixth Amendment right to the assistance of counsel in that the defendants were, in effect, deprived of the "guiding hand of counsel".

In *Brooks* v. *Tennessee*, 406 U.S. 605, 32 L.Ed.2d 358 (1972), this Court held that a statute which required the defendant to be the first witness for the defense or be precluded from testifying at all, violated due process in that it deprived the accused of "the guiding hand of counsel at every step in the proceedings against him", 406 U.S. at 612-13. Requiring the defendant and his attorney to prematurely make "the important tactical decision" as to whether the defendant should testify without adequate opportunity to properly evaluate the need for his testimony by considering such factors as how the other defense witnesses performed, was said to be an unconstitutional restriction on the role of the defense counsel in providing meaningful representation. *Brooks* v. *Tennessee*, 406 U.S. at 612.

Likewise, the procedure followed here effectively deprived the defendants of "the guiding hand of counsel" in that counsel was basically left without any information to properly evaluate "the important tactical decision" as to which jurors should either be challenged for cause or excluded by use of peremptory challenges. Without knowing whether the prospective jurors had already formed or expressed an opinion concerning their client's guilt, defense counsel could not provide any meaningful guidance in selecting a fair and impartial jury. A procedure which, in effect, excludes counsel from any meaningful participation in making such an important tactical decision conflicts with this Court's previous decision in *Brooks* v. *Tennessee, supra.*

4. The procedure followed by the trial judge departed from the accepted and usual course of judicial procedure to such an extent as to call for the exercise of this Court's supervisory powers over the administration of federal criminal justice.

This case presents a federal criminal conviction and thus the standard of review is less stringent that the review of state criminal cases. While the above authority indicates that the procedure followed in this case was constitutionally deficient and thus unacceptable even in state cases, this Court's decision in *Marshall* v. *United States,* 360 U.S. 310, 79 S.Ct. 117, 3 L.Ed.2d 1250 (1959) provides additional authority for consideration of this case pursuant to the Court's supervisory powers over the administration of federal criminal justice. In *Marshall* this Court reversed a conviction pursuant to it's supervisory powers, where jurors were exposed during trial to news articles referring to prior convictions of the defendant, despite the assurances of the jurors that they would not be affected thereby.

Inasmuch as the trial judge in this case did not undertake to conduct any inquiry into the nature and degree of exposure of the prospective jurors to the massive prejudicial publicity in this case, the precise nature of any such exposure will never be known. However, from the record in this case, including the articles attached to the defendants' various motions, it can be safely assumed that many of the prospective jurors were exposed to material equally as prejudicial as that to which *Marshall* jurors were exposed. The trial judge's failure to conduct any appropriate and meaningful inquiry into the effects of this massive prejudicial publicity would appear to conflict with this Court's decision in *Marshall* v. *United States, supra,* and calls for the exercise of this Court's supervisory powers.

C. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN PREVIOUSLY DECIDED BY THIS COURT CONCERNING PROCEDURES TO BE UTILIZED TO INSURE THE SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY IN CASES INVOLVING MASSIVE, PREJUDICIAL PUBLICITY.

While the refusal of the trial judge to inquire as to whether any prospective jurors had previously formed an opinion or as to the nature and extent of such opinion directly contravenes previous decisions of this Court, other important issues are presented concerning the conduct of the voir dire in this case which do not appear to have been previously decided by this Court. As discussed in part D, infra, the Courts of Appeals have split when presented with issues as whether jurors should be asked about the nature and extent of their exposure to prejudicial pretrial publicity, whether the jurors should be asked "content" questions, that is what they remember about the publicity to which they have been exposed, and whether or not the voir dire of such jurors should be conducted individually out of the presence of the other prospective jurors.

D. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH DECISIONS OF THE OTHER COURTS OF APPEALS.

The decision in this case conflicts with decisions of other Courts of Appeals in several respects. Some aspects of the decision such as the affirmance of the trial judge's refusal to ask prospective jurors whether they had formed an opinion concerning the case, or to inquire as to the nature and extent of any such opinion, puts the Sixth Circuit in direct conflict with every other Circuit that has ruled on the issue. Other related questions relating to the conduct of voir dire in this case, such as whether the prospective jurors should have been asked questions concerning the precise nature of their exposure to the pretrial publici-

ty, specifically what they remembered from such exposure, and whether the voir dire examination in this area should have been conducted on an individual basis, have split the circuits.

No other Circuit has approved a voir dire as circumscribed as the one conducted in this case where a significant possibility exists that the prospective jurors have been exposed to prejudicial pretrial publicity. The First, Fifth, and Seventh Circuits have specifically overturned convictions where the trial judge, as here, merely asked a conclusory question as to whether the jurors could be fair and impartial and made no attempt to conduct any meaningful assessment of their response. *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968); *United States* v. *Davis*, 583 F.2d 190 (5th Cir. 1978); *United States* v. *Hawkins*, 658 F.2d 279 (5th Cir. 1981); *United States* v. *Lewin*, 467 F.2d 132 (7th Cir. 1972); *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972). In *Patriarca*, the court noted the shortcomings of such a limited inquiry.

> A single question imposed to the panel en bloc, with an absence of response, does little or nothing by way of identifying, weighing, or moving any prejudice from prior publicity. 402 F.2d at 318.

The reason that such a limited inquiry is insufficient to protect the defendant's right to a fair and impartial jury is that jurors don't easily admit impartiality in a public forum.

> This obligation [to determine that the jurors are free of impartiality] would not seem to be discharged by general direct confrontational questions on human characteristics that most people are reluctant to admit that they possess. *U.S.* v. *Lewin*, 467 F.2d at 1138.

The Ninth Circuit has similarly held that such a limited voir dire does not suffice in cases involving significant pretrial publicity even though in the case presented there the trial judge had at least inquired as to whether the jurors had formed an opinion and as to whether they had discussed the case with others. The court noted that "merely going through the form of obtaining assurances was not enough". *Silverthorne* v. *United States,* 400 F.2d 627 (9th Cir. 1968).

An examination of several other cases which have rejected defendant's challenges to the adequacy of voir dire procedures in cases involving massive pretrial publicity indicates that the trial judge had indeed made at least a de minimus inquiry into whether the prospective jurors had formed an opinion concerning the case, the nature and extent of any such opinion, and often the nature and extent of the juror's exposure to the pretrial publicity. *See United States* v. *Bryant,* 471 F.2d 1040 (D.C. Cir. 1972) (adopting ABA Standard Relating to Fair Trial and Free Press, 3.4(a) 1968); *United States* v. *Liddy,* 509 F.2d 428 (D.C. Cir. 1974) (the trial judge did commence voir dire by individually questioning the jurors and the examination revealed that they remembered little and had not formed an opinion); *United States* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1979) (trial judge did inquire as to whether jurors had formed or expressed an opinion, whether they remembered anything they had heard or read, the papers and magazines they had read, whether they had specifically discussed the case with anyone, and other specific questions to determine their knowledge); *United States* v. *Addonizio,* 451 F.2d 49 (3rd Cir. 1972) (trial judge did ask whether or not the jurors had previously formed an opinion, the nature and extent of their exposure to pretrial publicity, and the effect of such exposure on them); see also *United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364 (2d 1963) (voir dire of jurors concerning the nature and extent of previously formed opinion demonstrated existence of partiality despite jurors' contrary assertions).

While the Circuits have unanimously agreed that the determination of impartiality cannot be totally delegated to the jurors themselves, there has been a split of authority on related questions concerning the conduct of voir dire in cases involving significant prejudicial publicity. Several circuits, by either adopting Section 8.35 of the ABA Standards Relating to Fair Trial and Free Press (formerly section 3.4) or some variation thereof, have held that that individual questioning of jurors outside the presence of the other prospective jurors is required with respect to exposure to pretrial publicity. *See United States* v. *Liddy, supra,* (whenever there is a "significant possibility" of exposure to potentially prejudicial material); *Silverthorne* v. *United States, supra; Patriarca* v. *United States, supra.* However, other Circuits have held that individual voir dire is not necessary even in cases of massive publicity as the impact of such pretrial publicity can be assessed without requiring a prospective juror to describe that publicity. *See United States* v. *Dellinger, supra; United States* v. *Harris,* 542 F.2d 1283 (7th 1976) (individual voir dire "commended" though not required); *United States* v. *Davis, supra,* (discretionary with trial judge).

The Circuits have also split as to whether "content" question should be asked on voir dire, that is whether the prospective jurors should be asked what they recollect concerning the pretrial publicity. *Contrast Silverthorne* v. *United States, supra* (such questions normally required in cases of prejudicial pretrial publicity); *United States* v. *Johnson,* 584 F.2d 148 (6th 1978) (required if specific articles produced and juror's exposure not readily apparent from other questions); *with United States* v. *Addonizio, supra* (content questions held not required where the publicity was not particularly relevant); *United States* v. *Haldeman, supra* (content questions not required).

E. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF NUMEROUS STATE COURTS AND WITH STANDARDS ESTABLISHED BY THE PROFESSION.

This case derives its uniqueness not from the problem which confronted the trial judge, but rather from the solution which he chose. Problems inherent in attempting to implement the constitutional guarantee of a fair and impartial jury in the face of massive prejudicial publicity have long been discussed by the judiciary and trial bar. In response to the Warren Commission's call for a Code of Conduct to govern the press and attorneys, the ABA formed a committee whose report formed the basis of the ABA Standards Relating to Fair Trial and Free Press. After surveying the psychological and sociological literature, the committee concluded that an opinion, once formed, was often resistent to change and that new information imparted often was unconsciously manipulated in order to confirm the previously held opinion. See, ABA Advisory Committee on Fair Trial and Free Press, 60-67 (1968).

As a result Standard 8-3.5 (formerly 3.4) of the ABA Standards Relating to Fair Trial and Free Press requires that jurors be examined individually where there is a "substantial possibility" of exposure to potentially prejudicial material. The standard goes on to suggest that in such cases prospective jurors be asked what they have read and heard about the case and that inquiry be conducted to determine the effect of such exposure on the prospective juror's state of mind. Both the degree of exposure and the juror's own testimony as to his state of mind are said to be relevant to a determination of his acceptability. Thus, this standard proposes both a subjective and an objective test. The problem with the procedure followed here is that the trial judge only made the subjective inquiry and failed to elicit any information to enable objective assessment of the juror's assurances.

This Court has also often recognized that where a practice or procedure is widely followed by the states, this may be persuasive evidence that it is required by basic fairness or due process. See *Aldridge* v. *United States* 283 U.S. 308, 313, 75 L.Ed. 1054 (1931) (fact that voir dire inquiry then under consideration was permitted "in all sections of the country...attests to the widespread sentiment that fairness demands that such inquiries be allowed); *Mapp* v. *Ohio,* 367 U.S. 643, 651, 6 L.Ed.2d 1081 (1961).

Without attempting to catalogue each state's approach to voir dire in cases involving exposure to prejudicial publicity, the amici would simply point out that the procedure authorized by the Sixth Circuit in this case has been rejected by numerous state courts which have considered the problem. See *State* v. *Pokini* 526 P.2d 94 (1974 Hawaii)(question eliciting response of juror solely as to their subjective ability to be fair is not enough in cases involving substantial pretrial publicity); *Sommerville* v. *State* 521 S.W.2d 729 (Tn. 1975); *Young* v. *State* 407 A.2d 517 (Del. 1979)(jurors' assurances not enough; objective information should be elicited); *Mallott* v. *State* 608 P.2d 737 (Alaska 1980)(ABA Standard adopted); *State* v. *Littlefield,* 374 A.2d 590 (Maine 1977) (ABA Standard adopted); *State* v. *Goodson,* 412 So.2d 1077 (La. 1982)(ABA Standard adopted); *People* v. *Taylor* 447 N.E.2d 519 (Ill.App. 1983)(jurors' assurances held insufficient); *State* v. *Yurk,* 638 P.2d 921 (Kan. 1982)(juror's assurance that he could ignore prejudicial information in news article appearing during trial held insufficient); *Odle* v. *Superior Court of Contra Costa County,* 654 P.2d 225 (Cal. 1982)(individual voir dire will allow the trial judge to adequately assess the juror's assurances of impartiality where the extent of exposure and impact can adequately be explored); *State* v. *Emery* 642 P.2d 838 (Ariz. 1982) (jurors' assertion of impartiality not dispositive); *Brandon* v. *State,* 599 S.W.2d 567 (Tx.Crim.App. 1979)(trial judge erred in not asking jurors whether they had previously formed an opinion as to the defendant's guilt or in-

nocence); *State* v. *Williams* 230 S.E.2d 742 (W.Va. 1976)(jurors' assurance of impartiality insufficient where juror was exposed to prejudicial article during trial).

F. THIS CASE PRESENTS ISSUES OF IMPORTANCE TO THE ADMINISTRATION OF CRIMINAL JUSTICE BEYOND THAT OF THE RESPECTIVE INTEREST OF THE PARTIES.

1. The decision of the Sixth Circuit in this case is based upon a fictitious assumption that is contrary to the experience of the trial bar and which has been repudiated by social science research.

Every experienced trial lawyer is aware of that which motivated this Court's decision in *Irvin*, namely that the simple assurance of impartiality by a juror in a situation such as that presented here cannot be blindly accepted without further inquiry designed to elicit more objective information. Often jurors have a hard time admitting that they cannot be impartial when asked such questions by strangers in a public forum and where a degree of disapproval may be attached to such an admission.

The negative effect of exposure to prejudicial pretrial publicity and jurors' reluctance to admit their biases in this regard have been confirmed by the social science research in the area. See ABA Advisory Committee on Fair Trial and Free Press, 60-67 (1968); *Simon*, "Does The Court's Decision In *Nebraska Press Association* Fit The Research Evidence On The Impact On Jurors Of News Coverage?", 29 *Stanford Law Review* (1976); *State* v. *Williams*, 459 A.2d 641, 655, fn 10 (N.J. 1983)(cataloging numerous empirical studies lending support to the conclusion that pretrial publicity does indeed bias the expressed jurors).

The procedure followed here ignored the realities present in selecting jurors in highly publicized cases and thus reduced this important part of the trial to a hollow ritual.

2. If the decision in this case is allowed to stand, future defendants will, in effect, be precluded from showing that their Sixth Amendment right to trial by a fair and impartial jury has been violated.

In *Murphy* v. *Florida, supra,* this Court noted that despite a juror's assurance of impartiality it is always open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as well as raise the possibility of impartiality." 421 U.S. at 800. The rule requiring that the defendant demonstrate the juror's impartiality before the juror's assurances will be disregarded seems fair enough on its face. However, when applied in the context of the procedure followed in this case, the result is self-defeating, as the defendant is denied the only way he can effectively demonstrate that partiality, i.e. by some sort of inquiry directed to discover whether the juror holds an opinion and, if so, the nature and extent of that opinion. The distinction Justice Marshall made long ago that jurors merely bearing "light impressions" are not necessarily unacceptable, while those with "strong and deep impressions" may be unable to objectively evaluate the evidence, is somewhat academic when no inquiry is even made to determine the strength of the previously formed opinion. See *United States* v. *Burr,* 25 Fed.Cas. 49, 50 (C.C.Va. 1807).

The amici are concerned that the decision in this case virtually precludes defendants from meaningfully asserting their right to a fair and impartial jury in cases involving pretrial publicity in that they are denied the means necessary to actually show such impartiality. Statements of this Court to the effect that "the juror's assurances of impartiality are not dispositive", see *Irvin, Murphy,* are meaningless in such a context.

3. The decision of the Sixth Circuit in this case would logically allow for the virtual elimination of voir dire from trial procedure.

A defendant's right to a fair and impartial jury is perhaps the most basic of all constitutional guarantees. The right not to have illegally seized evidence or unlawfully obtained confessions admitted into evidence and the right to the assistance of counsel, are of little or no value if the jury selected to try him is not fair and impartial. One can only wonder what benefit a defendant gets from having even the most highly incriminating piece of evidence excluded from the jury's consideration, if the jury is impartial in the first instance.

If, in a case such as this, involving the trial of an ex-Governor attended by massive prejudicial publicity, the trial judge can merely ask the jurors, in effect, if they can be fair and not make any attempt to explore the effect of that publicity, then this case potentially forbodes even more drastic measures in the future in the name of "judicial economy". If this decision stands, then it is authority for whatever limitations on voir dire any subsequent trial court seeks to impose. While it is customary to inquire in voir dire as to the prospective jurors' knowledge of the particular facts involved in the case, knowledge of the parties, relation to the attorneys, relation to law enforcement officers, and any other factor which might at least initially call into question their partiality, and then to follow up on any affirmative responses thereto, such inquiries would no longer be required. Trial judges could simply ask the prospective jurors one question, en masse:

> Notwithstanding the fact that you may have personal knowledge of the facts in this case, or may personally know the parties involved, or may know or have been previously represented by the attorneys, or may have previously discussed the facts with someone or may have previously formed an opinion as to this case, could you

nonetheless set these feelings or relationships aside and simply decide the case based on the evidence presented in Court.

The human characterization which motivates most prospective jurors to believe that they can be impartial despite any extraneous considerations, coupled with many juror's natural reluctance to admit impartiality in a public forum, would operate in most cases to evoke no response to such a question.

The amici simply contend that while such a procedure might result in a savings of both time and money, nonetheless the price to be paid is too great. The amici do not urge that this Court mandate lengthy and detailed questions in an attempt to reach the innermost recesses of jurors' minds, but only that in cases involving this kind of publicity that at least some minimal inquiry be made so as to inform the parties as to which prospective jurors have previously formed opinions and what the nature and extent of those opinions might be. The amici urge this Court to decide the extent to which it is permissible for a trial procedure to be implemented where the effect of that procedure raises serious questions as to whether basic constitutional guarantees have been protected.

G. CONCLUSION

For the above stated reasons the amici urge this Court to grant the Petitions for Writ of Certiorari to review the decision of the Sixth Circuit in this case.

Respectfully submitted,

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